

Funding the Judiciary: How Budgeting System Shapes Justice. A Comparative Analysis of Three Case Studies.

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1. Introduction

Setting the budget is one of the most delicate issues a government has to cope with.

Resources are limited by definition, and the prioritization of their allocation creates competition among the different public departments: allocating more funds to one department means allocating less funds to the others.

The question is even more delicate when it comes to the judiciary, which is one of the three powers of the State, it must be independent, but its funding is in the hands of the other State powers, the executive or the legislative.

The separation of powers' principle is crucial to avoid the concentration of power in one single branch, but the one who holds the "power of the purse" has some "extra weapons," which could be used against the other branches. "An effective power of the purse gives the legislature a powerful trump card when disagreements arise between it and other branches of government, one that is so potent that it can threaten judicial independence" (Webb and Whittington 2004).

According to the European Network of Councils for the Judiciary (ENCJ) guidelines, a funding mechanism based upon transparent criteria is necessary to maintain the independence of the judiciary, as long as the judiciary is closely involved in setting these criteria.² Resources (personnel, salaries, buildings, operational costs, information technology, etc.) given to the judiciary must be consistent with the caseload and the citizens' legitimate expectation for an accessible, fair, and in reasonable time resolution of their conflicts, as well as prompt and effective decisions in criminal matters by the courts.

If, from the one hand, the dependence from executive or parliamentary driven funding mechanisms can affect judicial independence, from the other hand, an "excessive financial independence of the judiciary could be used by some judiciaries to shield themselves against legitimate reform efforts and reasonable expectation regarding performance" (The World Bank 2011).

The judiciary is not only a power of the State, but it uses public funds to deliver justice and enforce the rule of law, which is fundamental in a democratic society.

As a public service, it must be accountable to the taxpayers and inform them about the use of resources and the results achieved with that resources. Transparency in the use of public funds is necessary to pursue public trust.

Therefore, how, and how much, judiciaries gain from the State budget, and in which way they are accountable for what they spend, is of paramount importance for judicial independence, the well-functioning of courts, and public trust.

A rational and fair distribution of resources can help to ensure some fundamental values, which underpin the judiciary in democratic societies. A resources allocation based on transparent criteria can contribute to guarantee judicial independence from the other governmental branches; as well as a transparent allocation of resources can also improve the trustworthiness of the judiciary. A proper allocation of resources on judicial salaries and training can ensure integrity and competence of the court personnel. An allocation of resources aimed at pursuing equal performance of the different courts is reflected, in a sense, on equality of citizens before the law (Webber 2007).

While most of the European countries are basing their funding mechanism on historical costs, providing every year approximately the same amount of money to each court, regardless of the results obtained with that money, other countries (such as Denmark, Finland, France, the Netherlands and the UK) for a long time have implemented new funding mechanisms that can be labelled as "performance – based budgeting" systems.

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² European Network of Council for the Judiciary (ENCJ) (2016). *Funding the judiciary*. https://www.encj.eu/images/stories/pdf/workinggroups/encj_2015_2016_report_funding_judiciary_adopted_ga.pdf pages 3-5

Performance budgeting is the systematic use of information about the outputs, results and/or impacts of public policies in order to inform, influence and/or determine the level of public funds allocated towards those policies in the budgetary context. It is a system where performance information is integrated in the budgeting process, and it relates organizational costs and organizational outputs, policies development and resource allocation, performance targets and resource appropriation, managerial discretion and accountability.

As this paper will show, a performance-based approach can have different models. Some of them (e.g., program budget and zero-based budget) are mainly aimed at improving allocative efficiency; some others (e.g. formula funding or purchaser-provider model) have the broader scope to motivate the whole organization to perform better (Robinson 2007).

However, performance-based budget models, especially the ones using incentives for organizations and their professionals, have to be carefully implemented, taking into consideration the peculiarities of the judiciary. They have to be fine tune-up to avoid to “give absolute priority to productivity and figures, to the detriment of the quality of legal work” (Langbroek 2008), or there is the high risk to result in dysfunctional behavior, if they are based upon imperfect performance measures (Robinson 2007).

Consequences of the budgeting system on the judiciary are manifold. The change in budgeting approach can affect the organizational development, at national level (change in the judicial system governance settings, for example, the creation of a Court Administration Agency for the Judiciary in Finland), at court level (e.g. the creation of a management board for each court in The Netherlands), and at the single judge level (e.g. changes in the case assignment system, pressure to increase productivity, individualistic or team oriented approach, commitment to the court). A rational and fair distribution of resources can help to ensure some fundamental values, which underpin the judiciary in democratic societies, such as accessibility, equality, judicial integrity, competence, timeliness. Finally, the budget allocation criteria affect the extent to which resources and courts’ performance are balanced. If efficiency and effectiveness are not balanced across the Country’s courts, the budgeting system is not serving its purpose.

For this reason, it is important that the performance-based budgeting is grounded on a proper performance management system that takes into account and balances different values and related measures.

This is the first paper of an ongoing research project aimed at analysing an important and quite unexplored issue: the budget in the judiciary and its impact on the functioning of the judiciary.

The research question is: in what way, and to what extent, has the funding mechanism an impact on judicial efficiency, organization and values?

The first part of the research, to which this article belongs, will provide a description of budgeting and funding mechanisms in countries that have implemented a performance-based budget, comparing three case studies, focussing on: assessing budget needs, budget appropriation processes, indicators and criteria used for budget allocation, relation between performance indicators and funding, court presidents’ or court boards leeway to manage resources, policies and practices to balance judicial independence and accountability.

The second part will be aimed at analysing the impact of the budgeting process on the functioning of the judiciary in the three countries, concerning three dimensions: allocative efficiency, organization development, and values; and three levels of analysis: national, court, and single judge.

The study will be dealt with data analysis, documents review, online questionnaires and semi-structured in-depth interviews with experts from the selected countries.

Therefore, there are still several questions that need to be answered, which will be addressed in the following steps of the research project.

This paper addresses the topic of court budgeting, focusing on three cases studies: Finland, France, and the Netherlands, which have experienced different ways of “performance-based” budget for the judiciary³.

2. Performance-based budget models

In this paragraph, the main general characteristics of the most common performance-based budgeting models are briefly described while in the next paragraph how these models have been applied in the judiciaries of the three selected case studies will be analyzed.

In the last 20 years, many European Countries (e.g. Denmark, France, Finland, the Netherlands, Sweden, Switzerland, the UK) have progressively moved from a historical line-item budget, focused on the expenditures necessary to carry out public services (inputs), to budgets models more focused on the results (outputs and outcomes) obtained from those expenditures. The different aims of budgetary reforms, combined with different constitutional, political, and economic structure of European countries, have produced a variety of budgetary models that are “performance-based”.

3 Part of the information presented in this paper have been initially collected during a round table organized by the European Commission for the Efficiency of Justice of the Council of Europe and the Court Administration of Latvia, in Riga in November 2017.

According to the OECD⁴, performance budgeting can serve a number of purposes. From the citizens' point of view, a budgeting system that takes into account the performance of the different departments can enhance transparency and accountability, since it makes explicit the link between resources and results and enables the taxpayers to evaluate the proper use of public funds and the achievement of public goals. From the government point of view, it helps to make budgeting decisions underpinned by performance data, to compare departments, and to weight priorities. Finally, the performance – based budget can stimulate the performance enhancing the efficiency.

Although countries have adopted different approaches to budgeting process reforms, some common principles can be singled out. The main common principles applied are: a) the use and integration of performance information into the budget process, b) the improvement of government's planning and reporting framework, c) the focus on goals and priorities, d) a long-term approach, e) the monitoring and measurement of results, e) an attention to transparency, f) the use of incentives, g) the increasing of flexibility and accountability for public managers.

The expected main results of this new budgeting process are a) to ensure transparency and accountability, b) to rationalize the allocation of public expenditure, c) to prioritize services of higher social value, d) to increase efficiency and productivity.

Therefore, this process is supposed to boost the allocative and technical efficiency of public resources to improve the quality and quantity of services delivered to citizens.

The budgeting reform process in Europe is still an ongoing process, and budgeting models' practices are continuously evolving. A first classification of three different types of "performance-based budget", which can be defined as "a form of budgeting that relates funds allocated to measurable results" (OECD 2007), takes into consideration the link between performance information and funding. These three types are 1) presentational performance budgeting, 2) performance-informed budgeting, 3) direct/formula performance budget.

In the "presentational performance budgeting", there is no formal link between performance information and budget allocation (funding). However, Ministries, or agencies, in charge of drafting the budget can decide to produce performance information to orient budget negotiation and, then, allocation.

In the "performance-informed budgeting", the collection of performance information is formally part of the budget process, but there are also other factors that are considered in the decision-making process (e.g. policy priorities). The performance information can be used for planning or accountability purposes. In this case, performance information and budget allocation are loosely linked, and they are partially used to plan next year funding

In "direct/formula performance budgeting", funding is directly and explicitly linked to performance through a formula.

A more detailed classification of performance-based budget models is proposed by Robinson (2007), who takes into consideration a) purposes; b) performance information used; c) link between performance information and funding.

The table below shows the different performance-based budget mechanisms coming from this classification. These mechanisms are not mutually exclusive; in practice, each government can use a combination of these methods, or different models for different areas of policy.

"Program budgeting" and "Zero-based budgeting" models are aimed at allocating resources between different programs, and realizing allocative efficiency using formal methodologies for expenditure prioritization. The program budget makes explicit the costs of the activities that are necessary to obtain the expected results of each program. Budgeting is strictly related to the "policy cycle", and budget decisions are based on the evaluation of the results achieved by programs, and on the resources used to achieve those results. Program budgeting facilitates comparison and evaluation of the cost-effectiveness of alternative programs. In the zero-based budgeting model, programs are broken down into "decision packages", with different levels of priority and alternative budgets. The performance information is used as a base of knowledge to allocate funds.

The "Budget-linked performance targets" mechanism is characterised by the setting of specific levels of performance targets, and it is aimed at improving efficiency (output targets) or effectiveness (outcome targets). Performance targets are calibrated to the level of funding provided: targets describe the level of performance expected at any given amount of money, and any additional request of money from departments should be related to an improvement in output and outcome.

These models have a loose link between performance information and funding, while some performance budgeting models with a tight link are the "Agency level budgetary performance incentives", the "Formula funding", and the "Purchaser-provider model", which is a specific "Formula funding" model.

The "Agency level budgetary performance incentives" mechanism, or "bonus funding" model, entails incentives or sanctions depending on performance. Best performing agencies receive supplementary money, while poor performing agencies receive less money. The forecasted budget is related to past performance (output or outcome), and the amount of funding is not calculated by an algebraic formula, but by a more discretionary analysis of the performance information that does not take into consideration the cost of output. The explicit aim of this mechanism is to enhance performance through monetary incentives.

4 OECD 2017 Public Governance Directorate Budgeting and Performance in the European Union - A review in the context of EU Budget Focused on Results

Table 1 – Classification of performance-based budgeting mechanisms

	Purposes	Performance information	Link between Performance information and funding
Program budgeting	Allocative efficiency through expenditure prioritization	Output (and outcomes) achieved by programs, resources used to achieve results	Loose. Budget is mainly allocated about the program activities
Zero-based budgeting	Allocative efficiency through marginal prioritization techniques	Marginal cost and marginal benefits of decision packages	Loose. Budget is mainly allocated about the program activities
Budget-linked performance targets	Allocative and technical efficiency and effectiveness through target setting	Outputs and outcomes	Loose. Targets describe the level of performance expected at any given amount of money
Agency – level budgetary performance incentives	Better performance through incentives	Agencies' output and/or outcome	Medium. Future funding is related to past performance, but not through a formula
Formula funding	Improve performance and allocative efficiency through a direct link between performance and funding	Output measures	Tight. Expected results are related to funding through an algebraic formula
Purchaser-provider model	Technical efficiency and performance through incentives (payment for results)	Output and cost measures	Very tight. The formula is $P \times Q$ (price per quantity of output) and it is related to actual results

In the “Formula funding” model, the link between performance and funding is very tight, depending on an algebraic formula that links the planned output to the amount of funding, which can be the total amount or a part of the amount to be allocated. The budget amount is calculated by multiplying the expected number of output units for their “price”. The price is based on the estimates of the costs of delivering those outputs. If the actual output is different from the expected one, there is no reduction or increasing of funding. The “Purchase-provider model” is a peculiar formula funding model in which the budget is calculated on the basis of the actual output, multiplied for its given price. More output is produced, the higher is the budget allocated. These models are applicable only to outputs, because outcomes are generally not measureable. According to Robinson (2007) this last model, compared to the others, creates more intensive on efficiency.

In the next section, we will examine which ones of the performance-based budgeting models described have been applied to the judiciary in the three case studies: Finland, France, and The Netherlands, and what performance measures they rely on.

3. The budgetary models in the judiciaries of Finland, France, and The Netherlands

Budgetary reforms in the public sector in Finland, France, and The Netherlands started from the end of the '90s and involved the judiciary since their beginning. Although all the new funding systems are related to performance information, the overall approach, the indicators used, and the link between performance information and funding allocation are quite different in the three countries. Furthermore, if the performance is not in line with the targets, courts in different countries suffer different consequences.

The table below summaries these three different approaches.

Table 2 – Budgeting models in the three case studies

	Budgeting model	Performance information	Link between Performance information and funding	Consequences if targets are not reached
France	Program budget	Efficiency and effectiveness indicators	Loose link	No direct consequences
Finland	Budget-linked performance targets	Efficiency and effectiveness indicators	Medium link	Discussion and reallocation of resources
Netherlands	Purchaser-provided model	P x Q	Direct link	Budget refunding from the courts to the council

France is using a “Program-budgeting” approach since 2006. It introduced a programmatic budget law (*Loi organique aux lois de finances* – hereinafter LOLF) based on Missions, Programs, and Sub-programs, with the goal to increase the autonomy of the Ministerial departments and program managers, appointed for each program. They have the flexibility to allocate and re-allocate resources within programs, to achieve performance targets. Targets are related to three different standpoints: a) the citizens, interested in social and economic effectiveness; b) the users, concerned with the quality of service; c) the taxpayers, concerned with efficiency. The Justice Mission is divided into five Programs. Each Program is under the responsibility of a program manager, and it is divided into operational budgets. For the Justice Mission, Presidents of the courts of appeal are responsible for the operational budgets, but the program manager controls the fungibility of funds (Kirat 2010). The budget allocation to the different ministries does not directly depend on performance. Performance information is just used to inform decision-makers, and there are no direct consequences if performance targets are not reached.

Finland started from a “management by results” overall approach, and then moved to a “result-oriented budget process” with a model that can be associated to the “Budget-linked performance targets” model, since it sets the targets related to the budget amount provided, with a loose link between performance information and funding. Every year the Ministry of Finance sets the spending limit of the public expenses for the next four years. Within this framework, the Ministry of Justice negotiate with each court the amount of resources allocated and the targets that can be achieved with these resources. If the targets are not reached, it follows a discussion that can lead to a renegotiation of targets or to a reallocation of temporary resources. It frequently happens that the court that does not reach the targets obtains more resources. The idea behind this thinking is the fact that the citizens are equal and they should not suffer because of less performing courts⁵.

The Netherlands uses different budgeting models depending on the public sector. The funding mechanism used in The Netherlands’ judiciary has the characteristics of the “Purchaser- provider model”: the budget is based on the expected output, but it is subsequently modified on the basis of the actual output. Budget amounts and courts’ funding allocation are based on a “Price x Quantity” formula; where quantity is the expected number of solved cases for the next year, and the price is set by the Judicial Council, taking into consideration the costs to process different categories of cases, after a negotiation with the Ministry of Justice. When courts do not comply with the planned output, they have to refund the 70% of the agreed price of the unsolved cases in an “equalization account” managed by the Council for the Judiciary. Courts that produce more than forecasted receive 70% of the agreed price on the surplus of cases.

4. The budget cycle

According to the OECD⁶, the budget cycle can be divided into four phases: 1) formulation, 2) approval, 3) execution, 4) audit.

The budget formulation is the phase in which composition and budget amount are discussed and drafted, based on pre-established criteria. Once the budget is drafted, it needs to be formally proposed to and approved by, usually, the Parliament. The budget execution comprises both the budget allocation and the day-to-day management of the budget. At the end of the budget cycle, the proper use of financial resources must be evaluated, normally by an auditing agency.

⁵ Interviews with Ministry of Finance and Ministry of Justice in Finland – 27 August 2018

⁶ OECD (2007). *Improving Public Sector Efficiency: Challenges and opportunities*. Paris: OECD Journal on Budgeting Vol. 7 n. 1

As we will see, the budgeting process in the judiciary is affected by the governance structure. The governance model adopted in both France and Finland is still ministerial, while in the Netherlands there has been a shift of several functions from the Ministry of justice to the judicial council, and the budget is one of them (Lannaud 2007).

In France, the preparation of the budget for the judiciary, as well as for all the other public sectors, falls under the exclusive competence of the government” (Contini 2017). In this case, one of the key phases of the budget cycle is the discussion and the determination of objectives, indicators, and targets⁷. At the beginning of the year, the Ministry of Justice discusses with the Ministry of Finance the budget amount allocated for next year and the actions to be undertaken. At the same time, the Budget Directorate staff of each Ministry gets together to determine their financial needs. After these conferences, the Prime Minister can fix for each Ministry, and for each Mission, the maximum appropriation amount. In parallel, Performance Conferences are organized with the aim of establishing and evaluating the objectives and the related indicators of performance for each Mission. The result of these conferences is the “Annual Performance Program”, which is annexed to the Budget Law. Then, the budget appropriations are broken down by Programs. In September, the budget is submitted to the Parliament, to be approved in October.⁸ The performance information and the objectives for the three coming years are not used to determine the budget allocation between Programs; targets are set after the allocation of budget to Programs. “The challenge is to assure Parliament that government units will seek the best possible use of the funds granted to them, for a given policy”⁹ (Lannaud 2007).

Once the budget has been approved by Parliament, it is allocated to the Ministry of Justice, which is responsible for the various programs managed by program managers appointed by the Minister. The program for justice is “Program 166”, and the program manager of this Program is the director of judiciary services. Funds are allocated to courts by the annual performance program and performance indicators. Since 2004, the Presidents of the court of appeal are responsible for the implementation of the operational budget, and they authorize expenditures.

In France, four organizational units are in charge with the budget auditing: 1) the inspection unit of the Ministry, 2) the Inter-Ministerial Program Audit Committee, 3) the Audit Office, 4) the Parliament. They control the accuracy of the results, the consistency of objectives and indicators, the reliability of data, and the pertinence of action plans (Lannaud 2007).

In Finland, the Ministry of Justice, based on the State budget framework, decides guidelines and principles for budget allocation. The Department of Judicial Administration within the Ministry of justice is in charge of negotiating “face to face” with each Court President the budget needs and setting targets for the next year. The negotiation among the Ministry of Justice and the courts takes place in late-autumn. The discussion starts from the evaluation of the results of the previous year, and then it moves to the forecasting of incoming and solved cases for the following year, together with a proposal of budget and resources needed. Within the budget limit imposed by the framework, each court sets the number of cases it can solve with the resources allocated. Since the 80% of the court budget is related to salaries, the main focus of the negotiation is the number of judges and staff assigned to the court¹⁰. During this discussion, additional judges or temporary staff, where appropriated, are negotiated. Before individual negotiations, a kick off meeting with all the courts is arranged, with the aim of increasing transparency and providing a general overview of the situation of the judicial sector. At the end of the discussion, the funding appropriation of the court and the targets are decided. In practice, the budget allocated to each court do not depend from the number of decided cases, but the number of decided cases and the other targets depend on the amount of budget allocated to each court. Efficiency targets regard productivity, economic efficiency (cost per weighted case) and timeliness. Court management can also decide to set additional quality standards, such as timeliness and transparency of judicial procedures, consistency, and readiness of judgments, etc. The accomplishment of the targets is settled in the annual reports, which are used as a tool in the negotiation process. The results of these discussion and the performance information is taken into account for the drafting of the next cycle evaluation¹¹. The budget framework is adopted by Government in March, while the budget is approved by the Parliament in December. Additional money can be allocated during the year for specific needs. In Finland, the authority in charge of auditing the Ministry of justice budget is the State Audit Office, an independent public body.

In The Netherlands, there are two separated and overlapping flows to budget formulation, approval, and execution. The first flow deals with the Ministry of justice and the Council; the second one deals with the Council and the courts. As far as the first flow is concerned, in January the Council submits to the Ministry a budget proposal based on the forecasted number of solved cases and their prices. The number of cases solved is subject to annual discussion between the Council and the Ministry, while the prices for each category of cases are negotiated every three years, starting from the prices determined in the previous years. In September, the Ministry submits the proposal to the Parliament. Every change from the Council's proposal must be justified by the Ministry of justice. In October and in November, the Parliament discusses the proposal that can be amended.

7 B. Lannaud (2007) Performance in the New French Budget System, in Marc Robinson, Performance Budgeting. Linking funding and results

8 <http://www.vie-publique.fr/decouverte-institutions/finances-publiques/ressources-depenses-etat/budget/quelles-sont-etapes-elaboration-adoption-loi-finances.html>

9 Wittrup (2010) distinguishes two models: the traditional “Ministry of Justice model”, where the budget is managed and allocated by the MoJ, and the more recent “Council model”, where the budget is managed and allocated to a more or less independent body, that can be either the Judicial Council or an agency for Court Administration.

10 Interview with Kari Kieslaninen (Ministry of Justice in Finland) – 27 august 2018

11 Interview with Jyri Inha (Ministry of Finance in Finland) – 27 august 2018

The budget preparation for allocating budget funds to the courts follows a different timing. In May, courts are asked to fill in a form on 1 October with the performance of the previous year, and a forecast for next year, about the caseload (incoming and solved cases), the forecasted “revenue” (Price x Quantity), and forecasted expenses. Based on these data, in November the Council prepares its budget plan to allocate funds to the courts and other support services (ICT, training etc). In December, the Council and every court sign contracts about the forecasted number of cases to be solved and the corresponding budget.

The use of resources in the courts is subjected to audit by a private external auditor every year. The courts must account for the resources’ use to the Council, but not to the Ministry of justice. The Minister is responsible before the Parliament only for a general “good functioning of the judicial system”. (Contini 2017).

5. The use of performance information and the criteria for budget allocation

In a performance-based budget, the specification of objectives, the setting of performance targets, and the measurement of performance are of paramount importance, because they can directly affect resources allocation, courts’ organization, and judges’ behavior.

In France, the budget of the judiciary is included in the “Mission Justice”, which is divided into five programs. In 2018, the Program has three objectives and twelve indicators, as to the following table shows.

Table 3 – 2018 Programs for the “Mission Justice” in France

Objective 1	Improving quality and efficiency
Indicator 1	Average processing time for each type of court
Indicator 2	Percentage of courts exceeding 15% the targeted average processing time
Indicator 3	Average processing time in criminal matter
Indicator 4	Solved civil cases by a judge
Indicator 5	Solved criminal cases by a judge
Indicator 6	Solved civil and criminal cases by a staff employee
Indicator 7	Court of appeal reversal rate
Objective 2	Improving the efficiency of criminal justice response, the enforcement, and arrangements of criminal penalty
Indicator 1	Percentage of criminal cases subject to an alternative to prosecution
Indicator 2	The average time for recording a judgment on the National Criminal Record
Indicator 3	Enforcement rate of suspended or effective prison sentences
Objective 3	Modernizing the ordinary justice management
Indicator 1	Average cost per criminal case
Indicator 2	Number of electronic filings to be dealt with by the registry and number of electronic filings from the police

The indicators try to measure efficiency (productivity and expenses), effectiveness (speed of justice), and quality (reversal rates, enforcement, and alternative to prosecution). These indicators are integrated into the budget, and the annual performance plan is annexed to the Budget Law. This plan includes actions, costs, objectives, and results obtained and expected. However, these indicators are not directly linked to the number of financial and human resources granted to each court. Indicators are mostly used to evaluate if resources are efficiently allocated to programs and if actions are coherent with the objectives. “This information may, when necessary and along with other factors, lead members of parliament to propose amendments aimed at reallocating appropriations between programs grouped under the same mission” (Lannaud 2007).

Presidents of the appeal courts allocate the operational budgets among the first instance courts within the court of appeal jurisdiction. This allocation is made after consultation with presidents of first instance courts in a so-called “budget conference”. However, it is still not clear how performance indicators affect the results of this consultation, since “the allocation of funds to courts remains broadly speaking disconnected to the performance achieved in courts management” (Kirat 2010).

In Finland, the principal instrument for performance management is the annual central government budget, which includes resources and agreed targets and indicators to analyze the achievement of the targets. The Ministry of Justice, with the collaboration of the courts, establishes indicators to assess the operational performance of the courts (Aarnio 2003).

However, “Even though these indicators were developed to allocate resources to particular court offices, their use for this purpose does not follow automatically. The indicators instead form a source of knowledge on which to base discussion around the negotiation

of the budget of each court. They are also used during annual meetings to help the Ministry of Justice and the heads of each court office to define the objectives to be met” (Contini and Mohr 2008).

The primary criteria in resource allocation are the estimation of the weighted caseload (using weighted scores) for the following year, also taking into consideration the available resources, which are the basis for the budget negotiation process between the Ministry of justice and the Presidents of the courts.

Other indicators used in the budgetary negotiations are:

- Productivity: the number of decisions per judge, or the number of decisions per court personnel (calculated by dividing the number of decisions of a court by the number of judges or total staff working in that court);
- Efficiency: total court budget divided by the number of solved cases in that court;
- Effectiveness: the length of court proceedings. (Aarnio 2003)

The Finnish budget has a loose link between court performance and allocation of resources. Nevertheless, performance targets are set in an open discussion between the Ministry and the Presidents of the courts, through regular meetings that enhanced mutual trust and the sharing of common goals.

The Dutch budget allocation criteria for courts are more straight forward. The allocation is based on the formula “P x Q” (prices of cases multiplied by the number of cases solved – the calculation is done per different case categories).

The budget allocation from the Ministry of Justice to the Judicial Council is based on 11 case categories, which consolidate 70 case categories that are then used to allocate funds from the judicial council to the various courts.

It is also worth noting that the budget allocated from the Ministry of justice to the Council with the price for quantity mechanism is 95% of the total budget. The 5% left is allocated by the Ministry of justice to the courts for mega cases, or for other particular circumstance. Then, only 75% of the budget available to the Judicial Council is allocated to the courts through the price for quantity calculation; 25% is managed directly by the Council for information and communication technology projects, and for building rents.

The Ministry of justice decides the prices for case categories every three years, quantities are negotiated with the Council every year, by the forecasted number of solved cases. The Council sets both prices and quantities every year mainly by forecasted caseload and courts’ outputs. These prices are then used to allocate funding to the courts.

In the last years, some “quality measures” have been integrated into the calculation of prices per case category. For example, the number of cases reviewed by another judge¹², or the number of cases that are decided by a panel of judges, can increase the price per case negotiated with the Ministry of Justice. However, the eventually increased prices for a better “quality” in deciding cases leave each court the discretion to have the case reviewed by a second judge or decided by a panel of judge. In this way each court management board has the flexibility to play with the court’s costs and its budget..

Each court receives the same amount of money for a given case category. Courts that manage to keep their real costs low for case category can thus retain a surplus. In this way, there is an incentive for courts to reduce costs (De Rechtspraak 2014). Courts that produce more than forecasted receive 70% of the agreed price on the surplus of cases. Courts that produce less than expected must return 70% of the agreed price of the unsolved cases in an “equalization account” managed by the Council for the Judiciary.

6. Court management

One of the main features of the budgetary reform in the Netherlands is the autonomy of the courts, which are self-administering organizations, under the supervision of the Council.

Each court has its management board, which is in charge of the general management. The board is composed by the president of the court, the director of operations (usually a person with a managerial background), and another judge of the court appointed by the Council (Consultative Council of European Judges 2016). The management board is in charge of the allocation of resources within the court. No amount is earmarked, which means that the board has a large discretion about how to spend the money and can obtain additional resources if the court solves more cases than planned.

As salaries represent around 75% of the total court expenses and the revenue is calculated on solved cases, the leverages that court management can use to increase the court’s budget and/or decrease the costs are: a) stimulating judges’ production to increase the number of cases solved, b) moving judges within the court based on the caseload, c) hiring staff from temporary recruitment agencies to increase productivity, d) not replacing retired judges to decrease the cost per case, e) moving judges, only with their consent, to other courts and adding the judges’ salary costs to these latter courts, f) moving cases from an overwhelmed court to another and receive financial compensation for this.

Finnish courts have an executive board too, composed by the heads of departments and representatives of staff. Its function is purely consultative, supporting the president in its decisions. Unlike in the Netherlands, the budgetary autonomy of the Finnish courts is limited, since only 10% of resources are directly managed by the court – these resources are mostly used for office supplies

¹² This can be the case of a senior judge who reviews a case of a less experienced judge.

and judicial training. If they need extra resources to finance some innovation projects or to cope with unexpected necessities (e.g. a sudden increase in the number of incoming cases) they can ask directly to the Ministry of Justice that, after discussion, can provide the resources needed¹³. If they save money at the end of the year, they can keep it for the next year.

In France, according to Kirat, the situation is quite more complicated. If, theoretically, one of the purposes of the LOLF was to empower the court managers giving them autonomy, in practices court presidents have a very small leeway in the administration of the resources. Each program is divided into operative budgets under the responsibility of the courts of appeal chiefs. The chiefs of the courts of appeal, after negotiation, allocate the resources as a lump sum to the district courts. These sums are related to finance legal expenses such as telephone tapping or forensic evidences. If the court saves money, this money is not returned to the court. Furthermore, the transfer of responsibility to the heads of the courts was not supported by an adequate number of additional staff resources trained for managerial functions.

7. Concluding remarks

As mentioned in the introduction, this paper is the first work of broader research that will analyze in depth the performance-based budgeting processes and models in place in some European judiciaries, and their impact on court functioning. This work shows the need for more empirical research on this topic, which will be carried out.

A description of performance-based budget reforms that have been taken place in three judiciaries have been sketched, and an interesting variety of approaches and solutions, which will need further analysis, have already been observed.

Some positive impact on the functioning of justice is already emerging at this stage of analysis.

For example, one of the most immediate and visible effects of the French LOLF was the reduction of costs related to outsourced technical services, such as phone tapping, translation, and interpretation, towing services, etc. (Marshall 2008). This result has been reached including these expenses in the court budget under the responsibility of the courts (formerly they were managed at central level). This sense of ownership and the operational management by the court has allowed decreasing the costs without compromising the quality service.

In Finland, resource and judges' accountability have increased. The budgeting system has enabled the Ministry to "coordinate the principles of allocation and ensure equality and objectives rules" (Contini 2017). Through the weighting caseload scores, apparently there is a more balanced resources distribution among courts, with an increase in allocative efficiency. A further result is the increased transparency of the courts before the citizens¹⁴.

In The Netherlands, the performance-based budget has made the resource allocation process more transparent and based on clear and shared criteria, which contribute to improving allocative efficiency.¹⁵ According to the Court of Audit: "Since the introduction of performance-based funding, the cost of a court case stabilized after having increased for a long period of time (1983-2002), and the cost differences between courts and cases have declined. It is reasonable to assume that this is due in part to the introduction of performance-based funding".¹⁶

However, in all three countries, although to different degrees, judges are blaming the performance budget system to be the cause of too much pressure on efficiency, to the detriment of the quality of decision.

In France, the use of performance indicators was criticized by judges because indicators "do not reflect the reality of the judicial activities within the courts" (Kirat 2010), while, some indicators, like the appeal reversal rate, do not seem to be a good proxy of judicial quality. Judges also expressed concern about the funding mechanism: "the risk is that courts which may face some difficulties, because of a very high workload of judges or numerous vacancies for judges, will receive less funds because of their bad results which may weaken them even more and make them less attractive for new judges to come." (ENCJ 2017)

Some Finnish judges have considered the imposition of result targets as a threat to their independence Aarnio (2003), and they retain that the pressure on efficiency would shift their attention on the number of cases rather than on their quality. This pressure can lead to the dysfunctional effect: "due to productivity pressures, there can be situations where the present outflow is maximized by overly solving simpler cases." (Contini 2017).

Pressures on productivity and efficiency are also perceived by Dutch judges, who are complaining a higher caseload caused by the budgetary constraints, a strict schedule of hearings that reduce time allocated to cases definition and, therefore, reduced attention to the quality of judgment (Contini 2017). Other critics regard the possibility that too much pressure on judges' productivity can undermine their independence.

13 Interview with Tuomas Nurmi (President of the Helsinki district court) – 28 August 2017

14 Interview with Tuomas Nurmi (President of the Helsinki district court) – 28 August 2017

15 Interview with Jos Puts (Council for the Judiciary in the Netherlands) – 11 April 2018

16 <https://english.rekenkamer.nl/publications/reports/2016/04/21/funding-the-judiciary-system-consequences-for-efficiency>

For these reasons, it is important that the performance-based budgeting is grounded on a proper performance management system, which takes into account and balances different values and indicators of quantitative and qualitative performance.

The change in budgeting approach can also be affected, but it can also affect, the organizational governance of the judiciary. For example, in Finland, it is nowadays debated the establishment of a Court Administration Agency, in the Netherlands the new budget model contributed to creating more autonomous courts managed by a local management board. Changes in the allocation of resources can also lead to changes in the case assignment systems or in setting case priorities, which are two typical points of attention for judicial independence.

In the three case studies here considered, the new budgeting processes have affected the court governance and functioning, but it is not clear yet if and how it may have affected judicial independence and judge's impartiality. Some more hints on this issue can be drawn from the Netherlands, which has developed the budget model that offers the tightest link between performance measures and funding allocation. In the Netherlands, it may be safely said that the judiciary, as a whole, and the courts are more independent from other branches of Government, in particular, the executive. The Judicial Council, although in consultation with the Ministry of justice plays a fundamental role in budget appropriation and resources allocation to courts, which are based on clear and evidenced-based criteria, using a Purchaser-provided budget model. In this way, the judiciary has a factual based argument and clear performance indicators about what it may deliver based on the availability of resources. This cannot be safely said for the other two countries included in this study, because the other two budgets models applied do not have a tight connection between performance and funding. Therefore, it is even more difficult to understand if the budget process has affected judicial independence.

More empirical research is needed to better understand in practice the budget processes, and to try to test which budget model, if any, can fit better for the judiciary.

References

- Aarnio, A. et al. (2003). Quality and Justice in Finland. In Fabri, M. et al. (eds.), *The Administration of Justice in Europe: Towards the Development of Quality Standards*, p. 209. Bologna: IRSIG – CNR
- Contini, F. and Mohr, R., (2008). Reconciling independence and accountability in judicial systems. *Utrecht Law Review* 3 (2), pp. 26–43.
- Contini, F. (ed.) (2017). *Handle with care Assessing and designing methods for evaluation and development of the quality of justice*. Bologna: IRSIG – CNR
- De Rechtspraak - Council for the Judiciary (2014). *The financing system of the Netherlands Judiciary*. <https://www.rechtspraak.nl/SiteCollectionDocuments/The-Financing-System-of-the-Netherlands-Judiciary.pdf>
- European Commission for the Efficiency of Justice (CEPEJ) (2016). *European judicial systems. Efficiency and quality of justice*. Council of Europe publishing.
- European Network of Council for the Judiciary (ENCJ) (2016). *Funding the judiciary*. https://www.encj.eu/images/stories/pdf/workinggroups/encj_2015_2016_report_funding_judiciary_adopted_ga.pdf
- Kirat, T. (2010). Performance-based budgeting and management of judicial courts in France: An assessment. *International Journal of Court Administration* volume 2, issue 2, pp. 12 - 20
- Langbroek, P. (2008). Between Accountability and Independence for Judges: Reform of the Judiciary in the Netherlands. *Revue française d'administration publique* 2008/1 (n° 125), p. 67/79.
- Lannaud, B. (2007). Performance in the new French budget system. In Robinson, M. *Performance Budgeting. Linking funding and results* (pp. 193-211). New York, N.Y: Palgrave Macmillan.
- Marshall, D. (2008). L'impact de la loi organique relative aux lois de finances (LOLF) sur les juridictions. *Revue française d'administration publique* 2008/1 (n° 125), p. 121-131.
- Organisation for Economic Co-operation and Development (OECD) (2007). *Improving Public Sector Efficiency: Challenges and opportunities*. Paris: OECD Journal on Budgeting Vol. 7 n. 1
- Organisation for Economic Co-operation and Development (OECD) (2017). *Budgeting and Performance in the European Union A review in the context of EU Budget Focused on Results* Paris: OECD Journal on Budgeting Vol. 2017/1
- République Française (2017). Budget général : mission justice 2018 https://www.performance-publique.budget.gouv.fr/sites/performance_publique/files/farandole/ressources/2018/pap/pdf/PAP2018_BG_Justice.pdf.

Robinson, M. (2007). *Performance Budgeting. Linking funding and results*. New York, N.Y: Palgrave Macmillian.

Vie Publique (2018). Les finances de l'Etat <http://www.vie-publique.fr/decouverte-institutions/finances-publiques/ressources-dependances-etat/budget/qu-est-ce-que-budget-etat.html>

Webb, G., Whittington, K. (2004). Judicial independence, the power of the purse, and inherent judicial powers. *Judicature* 88.1

Webber, D. (2007). *Good budgeting, better justice: modern budget practices for the judicial sector*. Washington: The World Bank.

Wittrup J. (2010). Budgeting in the era of judicial independence. *International Journal of Court Administration*, 4th issue

World Bank (2011). *Improving the performance of justice institutions*. Colombia: The World Bank





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